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No. 91-659

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT FARMIGONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars petitioner's conviction for defrauding a Mississippi bank by using a fraudulently issued letter of credit in an attempt to obtain a loan, where petitioner had previously been convicted of defrauding the Louisiana bank that employed him by issuing the letter of credit, which was drawn on that bank without authorization.

2. Whether the district court erred in directing that petitioner's sentence for the Mississippi offense run consecutively to the sentence he received for the Louisiana offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 31-39) is reported at 934 F.2d 63.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1991. The petition for a writ of certiorari was filed on September 8, 1991, and is therefore out of time under Rule 13.4 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Southern District of Mississippi, petitioner was convicted of bank fraud, in violation of 18 U.S.C. 1344. He was sentenced to three and one-

half years' imprisonment, to be served consecutively to his earlier sentence for bank fraud in the Eastern District of Louisiana. The court of appeals affirmed. Pet. App. 31-39.

1. The evidence showed that, from March 1985 until his resignation on June 6, 1986, petitioner served as a senior vice president and loan officer of First Financial Savings and Loan Association in Lutcher, Louisiana. Throughout that period, petitioner, together with Loretta Lustig, a customer of the bank, engaged in a scheme to defraud First Financial by issuing unauthorized letters of credit in favor of various of Lustig's concerns. Lustig used the documents to obtain funds from other financial institutions and paid petitioner for his complicity. Pet. App. 32.

Shortly before his resignation from First Financial, petitioner signed a fraudulent letter of credit for the benefit of Double Development, Inc., a business owned by Lustig. The letter of credit ostensibly committed First Financial to pay Trustmark National Bank of Jackson, Mississippi, up to $550,000 in the event that Lustig's company defaulted on a loan. Petitioner was not authorized to issue the letter of credit, and First Financial had no knowledge of his actions. Pet. App. 32.

A few days after the letter of credit was prepared, Lustig presented it with a loan application to Trustmark. Relying on the bogus letter, Trustmark loaned Double Development $500,000. Pet. App. 33.

2. On April 19, 1988, prior to the commencement of the instant case, petitioner was charged in the Eastern District of Louisiana with defrauding First Financial. Count 9 of the 11-count indictment alleged that petitioner provided Lustig with the unauthorized letter of credit for the benefit of Double Development.

The Louisiana indictment did not name any financial institution other than First Financial. Petitioner entered a plea of nolo contendere to the Louisiana indictment, and the district court convicted and sentenced him in February 1990. Pet. App. 33.

3. In April 1989, while the Louisiana prosecution was pending, petitioner was indicted in the instant case for defrauding Trustmark. Count 2 of the indictment charged petitioner and Lustig with applying for a loan at Trustmark on behalf of Double Development using the same fraudulently issued letter of credit that was the subject of Count 9 of the Louisiana indictment. Petitioner moved to dismiss the Mississippi indictment on double jeopardy grounds, claiming that the offenses in the Louisiana and Mississippi cases were the same. After the district court rejected that contention, petitioner pleaded guilty to Count 2. Pet. App. 33.

4. Petitioner appealed, reasserting his claim that, under the Double Jeopardy Clause, his conviction on Count 9 of the Louisiana indictment barred his prosecution on Count 2 of the Mississippi indictment. The court of appeals rejected that contention. Citing *Blockburger* v. *United States*, 284 U.S. 299 (1932), and *Grady* v. *Corbin*, 495 U.S. 508 (1990), the court acknowledged that successive prosecutions may be foreclosed for "different offenses from different statutes arising out of the same acts or occurrence." Pet. App. 36. The court observed, however, that this case does not present that situation; rather, petitioner "violated the same statute on two separate occasions, in two different ways, involving two different victims." *Ibid.* The court explained that the Mississippi indictment charged the fraudulent presentation of the letter of credit to Trustmark as collateral for the $500,000 loan, whereas the Louisiana

indictment charged the fraudulent issuance of the letter of credit by petitioner as part of a scheme to defraud First Financial. *Id.* at 36-37. The court concluded that "[a]lthough both indictments arose out of the same initial scheme, neither requires proof of intent to defraud the other unnamed financial institution." *Id.* at 37. Accordingly, the court held that the two indictments "set[] forth * * * separate and independent violation[s]." *Id.* at 38.

Petitioner also contended on appeal that the district court erred in directing that his sentence run consecutively to the Louisiana sentence, arguing that cumulative sentencing is improper for violations of the same statute arising from the same fraudulent scheme. The court of appeals upheld the sentence, reiterating that petitioner "committed two separate violations of a single statute, involving distinct acts and independent intent to defraud two discrete financial institutions." Pet. App. 39.

ARGUMENT

1. Petitioner renews his contention (Pet. 8-11) that he was prosecuted twice for the same offense in violation of the Double Jeopardy Clause.[1] According

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[1] In light of its decision on the merits, the court of appeals did not address the issue, not raised by the parties in the court of appeals, whether petitioner's guilty plea waived his double jeopardy claim. See Pet. App. 35 n.3. This Court has held that "a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one that the State may not constitutionally prosecute." *United States* v. *Broce*, 488 U.S. 563, 575 (1989), quoting *Menna* v. *New York*, 423 U.S. 61, 63 n.2 (1975). Here, we understand petitioner to argue that the instant prosecution is facially duplicative of the earlier one, and he does not seek to adduce additional

to petitioner, both indictments charged his attempt to defraud First Financial--the Louisiana bank that employed him—as a violation of the mail fraud statute, and prosecution twice for that offense under the same statute would violate the Double Jeopardy Clause.

a. Petitioner is incorrect in asserting that both indictments charged that he attempted to defraud First Financial. The court of appeals explained that "a single transaction, especially if, as here[,] of any extended sort, can produce numerous infractions." Pet. App. 36. After analyzing the two indictments, the court of appeals agreed with the district court that "[a]lthough both indictments arose out of the same initial scheme, neither requires proof of intent to defraud the other unnamed financial institution." *Id.* at 37. That conclusion concerning the meaning of the two indictments brought against petitioner, concurred in by both lower courts, was correct and would not in any event warrant further review. In light of that conclusion, the court of appeals correctly determined that petitioner violated the bank fraud statute twice.[2]

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evidence to support his claim. In these circumstances, we do not contend that petitioner's guilty plea constituted a waiver.

[2] Petitioner does not challenge the court of appeals' conclusion, as a matter of statutory construction, that the unit of prosecution under the bank fraud statute, at least in circumstances similar to those presented here, turns on the number of victims, not the number of financial instruments involved. In any event, the court of appeals' decision that the two attempts to defraud the two banks in two different ways—attempts that were completed at two different times—constituted two violations of the statute was plainly correct and not in conflict with any decision of any other court.

b. Petitioner's second prosecution did not violate the Double Jeopardy Clause. The Double Jeopardy Clause does not control Congress's power to define the unit of prosecution under a criminal statute. If a defendant is prosecuted twice for violation of the same statute in circumstances under which Congress intended only a single unit of prosecution, the second conviction must be reversed as a matter of substantive criminal law, because Congress intended the defendant's conduct to result in only one violation of the statute. If, on the other hand, a defendant is prosecuted twice for violation of the same statute in circumstances under which Congress intended there to be two units of prosecution, then the second conviction is valid under the statute and raises no issue under the Double Jeopardy Clause.

This Court has long held that congressional intent is determinative as to the definition of the unit of prosecution under a federal criminal statute. As the Court explained in *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978):

> It is Congress, and not the prosecution, which establishes and defines offenses. Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. But once Congress has defined a statutory offense by its prescription of the "allowable unit of prosecution," that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this congressional choice.

See *id.* at 70 n.24 (analysis under the *Blockburger* double jeopardy test is appropriate where "a *single* transaction may give rise to separate prosecutions

* * * *under separate statutes*") (emphasis added); see also *Ladner* v. *United States*, 358 U.S. 169, 173 (1958) ("[t]here is no constitutional issue presented" in a case involving the appropriate unit of prosecution under a federal criminal statute); *Bell* v. *United States*, 349 U.S. 81, 82 (1955) ("The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment."); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *In re Snow*, 120 U.S. 274, 283-286 (1887). See also *Whalen* v. *United States*, 445 U.S. 684, 703-704 (1980) (Rehnquist, J., dissenting) (discussing rule that "the proper unit of prosecution [is] completely dependent upon the legislature's intent").

Nothing in *Grady* v. *Corbin*, on which respondent relies, altered the well-settled principle that definition of the unit of prosecution under a federal criminal statute is a matter of congressional intent. Like its predecessors, *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980), *Grady* involved the question whether violations of *different* statutes arising from a single act or transaction are the "same offense" under the Double Jeopardy Clause, and hence may not be prosecuted separately. Cf. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (stating test for when "the same act or transaction constitutes a violation of two distinct statutory provisions"). The question presented by this case, by contrast, is whether respondent's use of the same instrument to defraud two different banks at two different times constitutes a single violation or two separate violations of a single statute. Accordingly, *Grady* v. *Corbin* has no bearing on the analysis of this case, which turns entirely on the

question of the congressional intent underlying the bank fraud statute.[3]

2. Petitioner further contends (Pet. 12-13) that the district court violated the Double Jeopardy Clause in directing that the sentence imposed in this case run consecutively to the sentence imposed for his earlier bank fraud conviction. He argues that that is so because the two offenses are the same. To be sure, absent clear congressional intent to the contrary, a court may not impose cumulative punishment where multiple offenses arising out of a single act or transaction are the same. See, *e.g.*, *Missouri* v. *Hunter*, 459 U.S. 359, 365-366 (1983). But, as we have shown, petitioner's bank fraud offenses arose out of distinct criminal acts committed on different days against different banks. Nothing in the Double Jeopardy Clause precludes consecutive sentences for separate violations of the same statutory provision, and petitioner cites no authority to the contrary.

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[3] This case need not be held for this Court's decision in *United States* v. *Felix*, No. 90-1599. *Felix* presents two issues concerning the interpretation of the Double Jeopardy Clause, in light of this Court's decision in *Grady*: whether a person may be prosecuted for a drug conspiracy after previously having been prosecuted for a substantive drug offense based on the same conduct that is alleged in some of the overt acts of the conspiracy charge; and whether prosecution for substantive drug offenses is barred because the defendant was previously prosecuted for drug offenses arising out of altogether different conduct, where evidence of the later-prosecuted offense had been introduced in the earlier prosecution to prove intent. *Felix*, like *Grady*, raises no "unit of prosecution" issue, much less any question having to do with the interpretation of the bank fraud statute. Accordingly, this Court's disposition of *Felix* would be unlikely to have any bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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